Supreme Court U.S.
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No. 01-507

In The

Supreme Court of the United States

JOHN J. LEWIS,

Petitioner,

v.

COUNTY OF ORANGE,

Respondent.

On Petition For Writ Of Certiorari To The Fifth District Court Of Appeals In And For The State Of Florida

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

KIMBERLY A. ASHBY, ESQUIRE
Florida Bar No.: 322881
Counsel of Record
AKERMAN, SENTERFITT & EIDSON, P.A.
Citrus Center, 10th Floor
255 South Orange Avenue
Post Office Box 231
Orlando, Florida 32802
Phone: (407) 843-7860
Fax: (407) 843-6610
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE PETITIONER PROPERLY PRESERVED ANY RIGHTS TO CHALLENGE THE NOTICED ACTION TAKEN BY THE BUILDING CODES BOARD OF ADJUSTMENTS AND APPEALS PURSUANT TO ORANGE COUNTY AND THE STANDARD UNSAFE BUILDING ABATEMENT CODE.

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STATEMENT OF THE CASE AND FACTS

The following statement of the case and facts is submitted to supplement and clarify the statement of the case and facts presented in Petitioner's Petition. At the trial court, Orange County submitted the Affidavits of Christ T. Sanidas which verified all of the facts contained in Orange County's motion for summary judgment, as well as authenticating the documents attached. These included a "notice of unsafe structure and order to abate unsafe conditions" issued by the Orange County Building Official to Petitioner relating to the property. (Appendix A) The order declared that "the building located on the property is in a general dilapidated condition so severe as to be unfit and unsafe for human occupation, and constitutes a nuisance. It is unsafe and unsanitary and, generally, violates the following code provisions. . . . [specific citations omitted]." In accordance with Orange County Code Section 9-811 and Section 302.1 of the Standard Unsafe Building Abatement Code ("standard code"), the order gave Petitioner ninety days in which to demolish the structure or correct the deficiencies. (Appendix A) The order was incorporated by reference into the Affidavit of Mr. Sanidas. (Appendix A) Petitioner did not raise any challenge to the competency of any of the evidence submitted by Orange County.

Petitioner appealed the order to the Building Codes Board of Adjustments and Appeals ("Board"). An evidentiary hearing was held before the Board on August 27, 1997. After hearing the evidence and argument presented, the Board issued its final order, affirming the building officials' findings and order in all respects. (Appendix B) A copy of the Board's final order was

attached to the motion for summary judgment. (Appendix A) Petitioner had 30 days within which to challenge the Board's final order in circuit court. Fed. R. Civ. P. 9.160(c); Code § 9-22(c) and Standard Code § 401.1. He chose not to appeal the final order.

On January 21, 1998, Orange County's Building Department confirmed to Petitioner that because he had not complied with the order and abated or repaired the building, the County would have it demolished. A copy of this notice is attached to the motion for summary judgment. (Appendix A)

Upon receiving the demolition notice, Petitioner filed a Circuit Court action seeking to enjoin the demolition. For that action, Petitioner was represented by Mr. McLeod, the same lawyer who filed this action. After holding an evidentiary hearing, the circuit court entered an order denying Mr. Lewis' request for an injunction.[1] (Appendix A) In doing so, the Court found that "the Plaintiff has not complied with the laws, codes, and regulations of Orange County, [and] that the place is hazardous for human occupation." (Appendix A) A copy of the Court's August 20, 1998, order is attached to the motion for summary judgment.

On September 22, 1998, Orange County had the unsafe structure demolished in accordance with the prior notices to Plaintiff and with Orange County Code Section 9-811 and Standard Code Section 604. On November 30,

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[1] Petitioner's assertion that the circuit court simply relied on the administrative order is false. The court reviewed the matter *de novo*, with another evidentiary hearing.

1998, the County's Building Official notified Petitioner of the cost of demolishing the structure, and requesting reimbursement of the demolition cost (in the amount of $4,277.97). (Appendix A) A copy of this notice is attached to the motion for summary judgment. (Appendix A)

ARGUMENT IN OPPOSITION TO PETITON

Petitioner concedes that a motion for summary judgment may be granted before an answer is filed although the standard for prevailing is higher. The cases cited by Petitioner establish only that in those cases a genuine issue of fact remained which could not be resolved by summary judgment as a matter of law. In the present case, Orange County proved that there was no fact issue, and the County was entitled to a final judgment as matter of law because Petitioner could not prevail on the legal theories under which the complaint was framed.

Citing to settled Florida law, the trial court in the case below ruled that Petitioner was barred from relitigating for a third time whether the structure was in a dangerous and unsafe condition, and was bound by the prior final orders from the Board and the Circuit Court as to this central issue. With the unsafe condition of the building established in prior proceedings, the Court applied the well-settled law that when government gives notice, a full and fair hearing and a reasonable and adequate opportunity to avoid demolition by repairing the structure, it is not a violation of the owner's constitutional rights to demolish the dangerous and unsafe building.

In *Lakes of the Meadow v. Arvida/JMB*, 714 So.2d 1120 (Fla. 3d DCA 1998), the 3d DCA held that there were issues remaining regarding the efficacy of a release, and whether it would be enforceable. In the complaint, the condominium association pled there were latent defects chargeable against the Defendant which by definition could not have been discovered at the time of its execution of the release. Thus, factual issues remained and the summary judgment was reversed. This would have been true even if the answer had been filed because the movant has the responsibility for foreclosing out the factual issues.

E.J. Associates, Inc. v. J.E. & A. Price Foundation, Inc., 515 So.2d 763 (Fla. 2d DCA 1987), cited by Petitioner, actually supports the position of Orange County. The 2d DCA *affirmed* the entry of summary judgment before an answer was filed, recognizing that Rule 1.510 provides for a motion for summary judgment to be filed any time after 20 days from the commencement of suit. In *E.J. Associates*, the Petitioner never contested the correctness of the supporting affidavits submitted by the movant. The fact that no answer was ever filed did not create an issue of fact to justify the denial of the summary judgment application, or the reversal of the final judgment on appeal. *Id.* at 764.

Similarly, Petitioner did not contest the support brought by the County for the motion for summary judgment. Nowhere in the record did Petitioner submit any evidence to refute that the building was not illegally unsafe or unfit for habitation, and thus, violative of the applicable codes. Nowhere in the record did Petitioner submit any evidence that the condemnation on the unsafe structure was not a proper exercise of police power as a factual matter. In fact, Petitioner's counsel did not even attempt to argue any facts to support such a finding.

Therefore, the only matters to be argued were issues of law which made this motion perfectly suited and timely.

Petitioner relies on *Melbourne Medical Laboratory, Inc. v. Lab Corporation of America*, 722 So.2d 962 (Fla. 5th DCA 1998), for the proposition that summary judgment was denied only because it was based on an affirmative defense not found in the pleadings. Initially it should be noted that in *Melbourne Medical Lab*, answers had been filed to the main claim and the counterclaim. The Petitioner complained that summary judgment should not have been granted on its counterclaim for intentional interference with a business relationship because the movant relied on competition and economic privilege as part of the summary judgment motion but had never pled them as affirmative defenses. In support of the motion for summary judgment plaintiff had filed an affidavit which only established the facts for the main claim. The Court affirmed the granting of summary judgment of the main claim. However, the defendant/counterclaimant had filed an opposing affidavit which established facts to support the counterclaim for intentional interference. The movant had not only failed to plead the affirmative defense of economic privilege, according to the opinion, the movant had also not provided affidavits regarding that claim. Therefore, facts remained in dispute. In *Melbourne Medical Lab*, the Court noted the defense of competition was argued for the first time at the hearing on summary judgment. The Court was rightly concerned about the surprise element of a summary judgment motion which is based on arguments never pled.

There was no record evidence here to establish any factual basis for a finding that the destruction of the property was for any reason other than a proper exercise of police power. There was no evidence proffered that there was some basis for coram nobis because new evidence had been discovered since the two prior hearings on the fact issues. Neither was any factual basis put forth to establish that Petitioner had not received a fair or full hearing at either the administrative or circuit court levels where the issues regarding the taking had already been reviewed. Further, there is no surprise element such as existed in *Melbourne Medical Lab,* nor does Petitioner attempt to argue that there was. Thus, there can be no application of *Melbourne Medical Lab* to the instant facts.

Kirkpatrick v. City of Jacksonville, 312 So.2d 487 (Fla. 1st DCA 1975), did not deal with a motion for summary judgment but instead only a motion to dismiss with prejudice. As such, the Court could review only the four corners of the complaint. Also, the City of Jacksonville argued that the taking in question was *not* within the police powers and somehow expected to avoid liability for an inverse taking by making such an argument. This case has no application because it did not involve the matters argued in a summary judgment motion with evidentiary supportings Affidavits and competent evidence. It simply dealt with whether a cause of action for inverse condemnation exists in Florida to withstand a motion to dismiss. Inverse condemnation may exist when an owner's property has been destroyed and there is no issue of an unsafe structure. However, *Kirkpatrick* does not stand for the proposition that inverse condemnation ever exists when the property which is destroyed is an

unsafe structure. Because of the divergent facts here, *Kirkpatrick* does not establish reversal of the summary judgment.

Another case cited by Petitioner which actually supports the County's argument is *Lantz v. Iron Horse Saloon, Inc.*, 717 So.2d 590 (Fla. 5th DCA 1998). This Court *affirmed* the dismissal of a complaint based on a release which had not yet been pled as an affirmative defense. Although there was no companion motion to dismiss in *Lantz* and the Court acknowledged that release was an affirmative defense to be pled, the Court upheld the summary judgment because argument regarding timing of pleading release had not been preserved in the trial court. Petitioner pled in the present complaint that there had been a taking for public purposes (Complaint at ¶16). In his response to the motion for summary judgment he argued generally that summary judgment should not be granted because the issue of whether there had been a compensable taking was only to be made on a case by case basis. He argued that discovery needed to be undertaken to establish that issue but did not suggest what facts were at issue to require discovery. Again, there was no issue of surprise regarding the County's exercise of police power. Petitioner did not preserve an argument that the police power exercise must first be pled as an affirmative defense to defeat a summary judgment motion.

Orange County's motion was a combined motion to dismiss and motion for summary judgment. It was timely because it was filed after 20 days from the commencement of suit. Fla. R. Civ. P. 1.510(c). It was complete because the substance of the arguments upon which the

motion was based was contained in the motion and memorandum in support. Petitioner does not identify any issues which were not addressed in the motions and does not identify issues of fact which remained at the time the final judgment was entered. The final judgment should be affirmed.

On appeal and before the trial court, Petitioner argued that the motion for summary judgment was premature because discovery had not been completed. The cases cited by Petitioner contain facts where discovery was pending or specifically identified discovery which was in the process of being undertaken. *See, e.g., Villages at Mango Key Homeowners Assoc. v. Hunter Development, Inc.*, 699 So.2d 337 (Fla. 5th DCA 1997) (summary judgments should not be entered when properly noticed depositions are pending); *UFF DAA Inc. v. Towne Realty, Inc.*, 666 So.2d 199 (Fla. 5th DCA 1996) (reversible error to enter summary judgment when discovery is in progress and deposition is pending); *ACT Corp. v. Devane*, 672 So.2d 611 (Fla. 5th DCA 1996) (discovery pending and appeal dismissed because no nonfinal order jurisdiction). In this case, there was no discovery pending.

Trials will not become a thing of the past because of the proper application of Rule 1.510, as is suggested by Petitioner. The summary judgment rule is designed to dispose of cases which have remaining only legal issues which must be decided by the court as a matter of law. Author's Comment – 1967 to Rule 1.510. It is incumbent upon Petitioner to demonstrate reversible error before the summary judgment may be reversed. To imply that discovery will create an issue of fact without a hint of what those facts would be does not create that record evidence

of reversible error. Petitioner did not offer to either the trial court or this Court any suggestion of what discovery was thwarted by the entry of the final judgment. Further, he did not seek a continuance of the hearing to conduct discovery. Thus, this is not a basis for reversal and the Court should affirm.

Petitioner correctly recites Florida law that the propriety of an agency's action may not be challenged in an inverse condemnation proceeding. *Dept. of Ag. & Consumer Services v. Polk*, 568 So.2d 35, 38 (Fla. 1990) (citing § 253.763(2), Fla. Stat.; *Dept. of Ag & Consumer Serv. v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 103, n. 1 (Fla.) *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988)). He cites to no legal authority from this Court or any other for the proposition that Florida law violates the U.S. Constitution as a result. In the underlying action, the Code Enforcement Board made a factual finding that the Petitioner's property was so dilapidated as to be unfit and unsafe for human occupation. Petitioner sought an injunction in the circuit court to attempt to prevent the destruction of the property. The initial circuit court action brought by Petitioner resulted in the denial of the injunction because Petitioner had "not complied with the laws, codes and regulations of Orange County, [and] that the place is hazardous for human occupation."

Petitioner took no appeal of the Board's final administrative order. Nor did Petitioner appeal the denial of the injunction in the circuit court action which he subsequently filed. Having failed to appeal the Board's order affirming that the building was unsafe and should be demolished, Petitioner is now bound by those determinations. *Thomson v. Dept. of Environmental Regulation*, 511

So.2d 989, 991 (Fla. 1987); *Miller v. Booth*, 702 So.2d 290, 291 (Fla. 3d DCA 1997). The application of collateral estoppel is further endorsed by the first proceeding filed by Petitioner against Respondent in which the Florida circuit court specifically found that the applicable codes had been violated.

The issue of whether the structure was "unfit for human occupation" was brought for a third time by Petitioner. Petitioner is bound by the circuit court's action denying the injunction he sought there because that action was premised upon Petitioner's allegation that the first court's finding that the structure was not unsafe and therefore should not be destroyed. Since the issue was litigated and determined by the prior action of the circuit court between the same parties, collateral estoppel forecloses a relitigation of this same issue between the same parties on the same property. *See Dept. Of Health and Rehabilitative Services v. B.J.M.*, 656 So.2d 906, 910 (Fla. 1995) ("Collateral estoppel . . . prevents identical parties from relitigating the same issues that have already been decided [in a prior proceeding]").

There was no attempt by Petitioner to argue that he had brought the property into code compliance at any time. Nor did he attempt to argue any issue that the Code Enforcement Board or the prior circuit court judge had overlooked in the review of the Board's action. The uncontested record served by Orange County established the notice of unsafe and unsanitary systems in the house and the surrounding areas, making reference to several

applicable code sections which notice was given prior to the demolition. Petitioner's complaint did not challenge the notice given. Petitioner did not file an affidavit stating that he had requested additional particulars regarding the code citations and received no response. Petitioner did not argue that the referenced code provisions were illegally or unconstitutionally vague. Petitioner seems to argue that delegation to administrative code enforcement boards is somehow legally unconstitutional but cites only to general reference about warrantless search and seizures. He does not challenge any of the individual procedures, notices and guidelines followed by Orange County under its code which enables it to carry out its police power when necessary to protect public health.

The Fifth District Court of Appeal did address the issues relating to Petitioner's claim that some personal property was lost in the demolition of the structure demolished for public health issues. Since notice was given sufficiently in advance of the demolition, Petitioner had adequate time to remove anything he chose to from the building. This did not therefore constitute an unconsitutional taking.

Florida law specifically provides when the State through its agents destroys property such as diseased cattle, decayed fruit or fish, or buildings in the path of a conflagration, it is clear the constitutional requirement of just compensation does not compel the State to reimburse the owner whose property is destroyed because such property is incapable of any lawful use, it is of no value and it is a source of public danger. *State Plant Board v. Smith*, 110 So.2d 401, 406-07 (Fla. 1959). This is also the

law in other jurisdictions, specifically as it applies to structures condemned for safety and sanitary reasons. In *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995), the court construed the Oregon state constitution which provided that "[p]rivate property shall not be taken for public use . . . without compensation." Oregon courts had held that the thrust of the Oregon constitutional provision was to pattern it after the taking provisions of the Fifth Amendment to the United States Constitution. *Id.* at 787. *Compare, Fla. Const.* Art. X, § 6. The Court reasoned that the demolition of the property was not a taking for public use. It held that the City did not acquire a permanent right or thing for public use by its action. It further held that the constitution does not guarantee compensation to the landowner who maintains the property in violation of existing law. The landowner did not contend that the regulations applying to the property were somehow overreaching or not a proper exercise of police power. *Id.* at 788.

In *Hialeah Racing Commission v. Gulfstream Park Racing Assoc., Inc.*, 210 So.2d 750 (Fla. 4th DCA 1968), the court held that a 1947 action determining rights as to racing dates allocated to horse tracks would not have a res judicata effect on an action brought in the late 1960's as numerous facts had changed during the twenty year interim, including the growth of some race tracks, and the demographics of the surrounding areas. In a situation where there are substantial factual changes relating to the issues between the parties, and a twenty year time span has elapsed, it is true that res judicata has a receding effect. However, this case deals with the identical property, the identical parties, and the time frame anticipated

between the issuance of the order to condemn and the demolition of the property is far short of the twenty year time period affecting the horse tracks. *See also, Krug v. Meros*, 468 So.2d 299 (Fla. 2d DCA 1985) (the issue of whether plaintiff had any interest in or rights to leases was not contested in the first action and never litigated before the first trial court and therefore res judicata did not apply); *University Hospital, Ltd. v. State Agency for Healthcare Administration*, 697 So.2d 909 (Fla. 1st DCA 1997) (res judicata cannot bar a subsequent application for permit when application is supported by new facts, changed conditions or additional submissions by applicant).

Rowland v. Ex Rel. Martin, 176 So. 545 (Fla. 1937) is cited for the proposition that only a circuit court may make a determination for condemnation as a nuisance. The Florida Supreme Court does not so hold in this case. Instead, the Court reviewed an ordinance of the City of Miami which allowed a building inspector to be the sole determining party of whether to condemn a building as unsafe without any opportunity of the building owner to be heard. This made the building inspector "the informant, the judge, the jury, and the executive officer, and provides no means of redress in the event this official should wrongfully evict an owner or tenant either because of bad judgment or bad motives." *Id.* at 546. In none of the underlying proceedings did Petitioner raise as a point on appeal the unconstitutionality of the ordinance under which the condemnation proceeded. Nor does he cite now to any support that administrative proceedings afforded by Orange County do not accord the

notice and opportunity to be heard required by the Florida Supreme Court and due process under the U.S. Constitution. Even if he made such an argument, he did have the opportunity to litigate the issue of whether his property was actually unsafe and therefore subject to the ordinance in the prior circuit court action. When he failed to appeal the ruling of that case, and instead took a dismissal of that case after the ruling, he was subject to res judicata and/or collateral estoppel on the issue of the unsafe structure.

In the present case, the trial court had stated its finding that due process had been afforded on the record and only thereafter did the Petitioner serve a notice of voluntary dismissal. (R. 24-29).

The lower court was correct in ruling that there is no cause of action in inverse condemnation when it involves the demolition of an unsafe structure. Petitioner misconstrues the law when he cites *Dept. of Ag. & Consumer Services v. Polk*, 568 So.2d 35 (Fla. 1990) for the proposition that a cause of action for inverse condemnation for destruction of private property exists even when the government has destroyed that property in a valid exercise of its police powers and which applies to code violations. This case is distinguishable from those where the destruction involves an unsafe structure or another threat to the public safety or welfare. In *Polk*, the court found that numerous trees had been destroyed which should not have been. The fact that the destruction of the trees was still a valid exercise of a police power did not eliminate exposure for just compensation for those trees which were not diseased. Here, Petitioner never established any

basis for a fact question that his property was not properly demolished due to violations of code provisions governing unsafe and unsanitary buildings.

Petitioner cites *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) to support an argument that the County has improperly trespassed and seized property without a warrant. This was raised for the first time on the appeal to the Fifth District Court of Appeal that any such argument has been made and it is therefore not preserved for this petition. References to "caved in" septic tanks, damages to wells or the taking of personal property were made as arguments of counsel that have no support in the record, nor is there any attempt to cite to portions of the record. *Camara* involved a property owner's refusal to permit building inspectors to inspect his residence without a warrant. The Supreme Court held that under the Fourth Amendment the defendant had a constitutional right to insist that the inspectors obtain a warrant to search. Since Petitioner never made any demand for a warrant, and raised this for the first time on the appeal, the holdings in *Camara* have no meaning to this petition.

Finally, Petitioner references *State Road Department of Florida v. Tharp*, 1 So.2d 868 (Fla. 1941). In *Tharp*, the petitioner owned a water mill which was propelled by water and ponded in a mill pond. Actions taken by the *State Road Department* included filling and completely obstructing four of the channels leading to the mill. The Florida Supreme Court determined that compensation pursuant to eminent domain would be available to the owner of the property. Unlike a situation where a code

violation leaves property in an unsafe and unsanitary condition, this case merely allows for the award of damages to a property owner for actions taken by the state which have nothing to do with the use and misuse of the property by the landowner.

None of the law cited by Petitioner supports a contention that property condemned and slated for demolition because of code violations give rise to damages under a theory for inverse condemnation. This applies to both the real property and the personal property. This is Petitioner's third opportunity to argue these identical points and collateral estoppel or res judicata should apply to prevent these arguments from being raised and re-raised again and again. He cites to no code provision that must be considered unconstitutional for failing to afford due process but challenges the ability of Orange County to proceed with the execution of its police powers via the use of an Administrative Code Enforcement Board. According to Petitioner, a court must adjudicate every code violation to give such an order legal imprimatur. This would violate the separation of powers between the executive and judicial branches. For all of the above-stated reasons, the Petition should be denied.

Respectfully submitted,

KIMBERLY A. ASHBY, ESQ.
Florida Bar No.: 322881
Counsel of Record
AKERMAN, SENTERFITT & EIDSON, P.A.
Citrus Center
255 South Orange Avenue
Post Office Box 231
Orlando, Florida 32802
Phone: (407) 843-7860
Fax: (407) 843-6610
Attorney for Respondent

APPENDIX A

IN THE CIRCUIT COURT, NINTH
JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA
CASE NO. CI 98-10195
DIVISION: 40

JOHN J. LEWIS,

Plaintiff,

vs.

ORANGE COUNTY,
FLORIDA,

Defendant,

_____/

Orange County's Motion To Dismiss For Failure To State A Cause Of Action Or, Alternatively, Motion For Summary Judgment

In this matter, Plaintiff attempts to state a cause of action in inverse condemnation for Orange County's abatement and demolition of an unsafe structure on Plaintiff's property. " 'The general rule is that a [local government] in the exercise of its police power may, without compensating the owner, destroy a building that threatens the public safety where, after reasonable notice and opportunity, the owner fails to remedy the dangerous condition." *Hoeck v. City of Portland*, 57 F.3d 781, 788 (9th Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996), quoting *Shaffer v. City of Winston*, 576 P.2d 823, 825 (Or. App. 1978). *See also Willard v. City of Eugene*, 550 P.2d 457 (Or. App. 1976).

Background

On July 14, 1997, after conducting appropriate inspections, the Orange County Building Official served a "Notice Of Unsafe Structure and Order To Abate Unsafe Conditions" to John Lewis, relating to a structure on property at 402 W. Keene Road, Apopka, Florida. The Order declared that "[t]he building located on the property is in a general dilapidated condition so severe as to be unfit and unsafe for human occupation, and constitutes a nuisance. It is unsafe and unsanitary and, generally, violates the following code provisions . . . [specific citations omitted]." In accordance with Orange County Code Section 9-811 and Section 302.1 of the Standard Unsafe Building Abatement Code ("Standard Code"), the order gave Mr. Lewis 90 days within which to demolish the structure or correct the deficiencies. A copy of the order is attached as Exhibit A.[1]

Mr. Lewis appealed the order to the Building Codes Board of Adjustments and Appeals ("Board"). A hearing was held before the Board on August 27, 1997. After hearing the evidence presented, the Board issued its final order, affirming the Building Official's findings and order in all respects. A copy of the Board's final order is attached as Exhibit B. Plaintiff had 30 days within which to challenge the Board's final order in circuit court. *See* Orange County Code § 9-22(c) and Standard Code § 401.1. Plaintiff chose not to appeal the final order; and

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[1] All documents identified in this Motion are authenticated by the Affidavit of Christ T. Sanidas, attached as Exhibit H. In addition, Mr. Sanidas' Affidavit verifies all facts stated in this Motion.

the deadline for Plaintiff to demolish the building or correct the deficiencies passed, with Plaintiff doing neither.

On January 21, 1998, Orange County's Building Department confirmed to Mr. Lewis that because he had not complied with the order and abated or repaired the building, the County would have it demolished. A copy of this notice is attached as Exhibit C.

Upon receiving the demolition notice, Mr. Lewis filed a Circuit court action seeking to enjoin the demolition. For that action, Mr. Lewis was represented by Mr. McLeod, the same lawyer who filed this action. After holding an evidentiary hearing, Judge Jeffords Miller entered an order denying Mr. Lewis' request for an injunction. In doing so, the Court found that "the Plaintiff has not complied with the laws, codes, and regulations of Orange County, [and] that the place is hazardous for human occupation." A copy of the Court's August 20, 1998 order is attached as Exhibit D.

On September 22, 1998, Orange County had the unsafe structure demolished in accordance with the prior notices to Plaintiff and with Orange County Code Section 9-811 and Standard Code Section 604. On November 30, 1998, the County's Building Official notified Mr. Lewis of the cost of demolishing the structure, and requesting reimbursement of the demolition cost (in the amount of $4,277.97). A copy of this notice is attached as Exhibit E. Mr. McLeod responded on behalf of Mr. Lewis, stating that Mr. Lewis does not own the property on which the demolition took place. A copy of Mr. McLeod's letter is attached as Exhibit F.

Memorandum of Law

A. The County's Lawful Abatement And Demolition Of An Unsafe Structure Cannot As A Matter Of Law Support A Cause Of Action For Inverse Condemnation.

A local government's abatement and demolition of an unsafe structure does not support a cause of action for "inverse condemnation." *City of Portland*, 57 F.3d at 781. The rationales for this rule of law are fully explained in *City of Portland*, a copy of which is attached as Exhibit G. *See also, Shaffer*, 576 P.2d at 825; *Willard*, 550 P.2d at 457.

B. Plaintiff Cannot Relitigate The Factual Issues Of Whether The Building Was Unsafe, But Is Bound By The Prior Findings Of The Board And The Court.

If Mr. Lewis intended to challenge the Buildings Official's findings or actions in this matter, he should have done so through a timely appeal of the Board's final order. Having failed to appeal the Board's order affirming that the building was unsafe and should be demolished, Mr. Lewis is now bound by these determinations. *Thomson v. Dept. of Environmental Regulation*, 511 So.2d 989, 991 (Fla. 1987); *Miller v. Booth*, 702 So.2d 290, 291 (Fla. 3d DCA 1997).

Additionally, the issue was litigated a second time in Mr. Lewis' injunction action. Mr. Lewis is bound by the Court's finding that the structure on his property was "hazardous for human occupation." *See Dep't of Health and Rehabilitative Services v. B.J.M.*, 656 So.2d 906, 910 (Fla. 1995) ("Collateral estoppel . . . prevents identical parties

from relitigating the same issues that have already been decided [in a prior proceeding].")

Because Mr. Lewis is bound by the factual determination that the structure at 402 W. Keene Road was unfit and unsafe for human habitation, there can be no factual dispute to preclude application of the rule of law that demolition of an unsafe structure does not support a cause of action for "inverse condemnation." Therefore, this action should clearly be dismissed.

C. Plaintiff's Lack Ownership Of The Property, If True, Serves As An Additional Basis For Dismissal.

As seen in Exhibit E, Mr. Lewis' attorney has also recently represented to Orange County that Mr. Lewis does not own the property. Again, the law is clear that only an "owner" has standing to bring an inverse condemnation claim relating to the subject property. Article X, Section 6, Florida Constitution; *VLX Properties, Inc. v. Southern States Utilities, Inc.*, 701 So.2d 391, 395 (Fla. 5th DCA 1997).

Therefore, if counsel's recent representation to the County is correct, Mr. Lewis would not have standing to bring an inverse condemnation claim relating to the property at 402 W. Keene Road, even under different facts.

Conclusion

Because Plaintiff fails to state a cause of action, Orange County respectfully requests that the Court dismiss this action with prejudice or, alternatively, enter final summary judgment in the County's favor.

WHEREFORE, Orange County requests that this action be dismissed with prejudice.

Respectfully submitted,

/s/ Alan Lawson
Alan Lawson
Assistant County Attorney
Fla. Bar No. 709591
Counsel for Orange County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion, along with the attached Exhibits A through G and the Affidavit of Christ T. Sanidas, have been furnished to Johnie A. McLeod, Esq., Post Office Drawer 950, Apopka, FL 32704-0950, this 25th day of January, 1999.

ORANGE COUNTY ATTORNEY'S OFFICE
Litigation Section
One Landmark Center
315 E. Robinson Street, Ste. 650
Orlando, FL 32801
Telephone: (407) 836-2173
Fax: (407) 836-2178

/s/ Alan Lawson
Alan Lawson
Assistant County Attorney
Fla. Bar No. 709591
Counsel for Orange County

EXHIBIT A

NOTICE OF UNSAFE STRUCTURE AND ORDER TO ABATE UNSAFE CONDITIONS (BUILDING and HOUSING)

TO: John J. Lewis, and all other interested parties:

SUMMARY OF NOTICE

1. YOU ARE HEREBY NOTIFIED THAT THE ORANGE COUNTY BUILDING OFFICIAL HAS DETERMINED AND HEREBY DECLARES THAT THE STRUCTURE LOCATED ON THE PROPERTY DESCRIBED BELOW IS UNSAFE.

2. YOU ARE HEREBY ORDERED TO ABATE AND CORRECT THE UNSAFE CONDITIONS AS SHOWN BELOW.

3. IF YOU DO NOT WANT THIS ORDER TO BECOME FINAL AND BINDING UPON YOU, YOU MUST FILE AN APPEAL NOTICE AND REQUEST FOR HEARING AS SHOWN BELOW, WITHIN THIRTY (30) DAYS OF SERVICE OF THIS NOTICE AND ORDER. A TELEPHONE CALL WILL NOT PROTECT YOU. YOU MUST FILE A WRITTEN NOTICE OF APPEAL.

4. THE ORANGE COUNTY BUILDING OFFICIAL IS PROCEEDING AGAINST YOU UNDER THE RULES SET OUT IN THE STANDARD UNSAFE BUILDING ABATEMENT CODE (SUBAC). IF YOU DO NOT OBEY THIS ORDER, OR APPEAL IT, AS SET FORTH MORE SPECIFICALLY BELOW, THE PROCEEDING MAY RESULT IN ANY ONE OR ALL OF THE FOLLOWING:

A. ORANGE COUNTY MAY REPAIR OR DEMOLISH THE STRUCTURE AT YOUR EXPENSE.

B. ORANGE COUNTY MAY FILE A LIEN IN THE PUBLIC RECORD AGAINST YOUR PROPERTY TO SECURE THE EXPENSE OF SUCH REPAIR AND DEMOLITION.

C. YOU MAY ALSO BE SUBJECT TO PROSECUTION UNDER SECTION 104 AND 601 OF SUBAC.

DETAILED SPECIFICATIONS REGARDING THE STRUCTURE, PROPERTY LOCATION, VIOLATIONS AND UNSAFE CONDITIONS

OWNER OF BUILDING/ STRUCTURE:	John J. Lewis
NAME AND/OR DESCRIPTION OF BUILDING/STRUCTURE:	Single Family Residence Pole Barn, Addition and Wood Building
STREET ADDRESS OF BUILDING/STRUCTURE:	402 W. Keene Rd
LEGAL DESCRIPTION OF BUILDING/STRUCTURE:	28-21-28-5392-00-020 Mcqueen Select Homesites Lot 2 (Less S 207.5 FT)
OWNER'S ADDRESS:	402 W. Keene Rd Apopka, FL 32703

You are hereby notified that the above-described building has been inspected by Housing and Building Inspectors from the Orange County Building Department and found to be an illegal "unsafe building" as defined

by Section 202 of the Standard Unsafe Building Abatement Code, 1985 Edition. Therefore, the building is in violation of Section 101.3.5 and 102.5 of the Standard Building Code, 1991 Edition, the Standard Housing Code Section 103.2.1 and 103.2.4 and Standard Unsafe Building Abatement Code, Section 101.6.

YOU MUST CORRECT THE UNSAFE CONDITIONS BY REPAIR OR DEMOLITION. If you decide to repair the conditions, you are further notified that you must secure all necessary permits to correct the conditions described below and that you must *commence* the repairs by no later than the repair *commencement* date specified below. You must *complete* the repairs in accordance with all applicable codes by no later than the repair *completion* date specified below. You may, as an alternative, determine that it is preferable to demolish the building. If you choose that option, you must obtain the proper permits for that also, and have the work completed by the time you would otherwise have had to complete the repairs.

IF YOU FAIL TO COMMENCE WORK TO CORRECT THIS CONDITION ON THE DATE REQUIRED AND TO CORRECT THE CONDITIONS DESCRIBED BELOW IN ACCORDANCE WITH ALL APPLICABLE CODES BY THE REPAIR/DEMOLITION COMPLETION DATE SPECIFIED BELOW, THE BUILDING MAY BE ORDERED VACATED AND POSTED TO PREVENT FURTHER OCCUPANCY UNTIL THE REPAIRS OR DEMOLITION ARE COMPLETED, AND THE BUILDING DEPARTMENT MAY CAUSE THE REPAIRS OR DEMOLITION TO BE DONE AND ALL COSTS IMPOSED AGAINST THE PROPERTY OF THE OWNER OF RECORD AND LIENED IN ACCORDANCE WITH SECTION 601.2.2 OF

SUBAC. FURTHERMORE, YOU MAY BE SUBJECTED TO PROSECUTION IN ACCORDANCE WITH SECTIONS 104 AND 601.1 OF THE STANDARD UNSAFE BUILDING ABATEMENT CODE.

IF YOU DETERMINE TO *REPAIR* THE BUILDING OR STRUCTURE, YOU MUST SECURE THE NECESSARY PERMITS *AND* COMMENCE THE REPAIR WORK *WITHIN 60 DAYS FROM THE DATE YOU WERE SERVED WITH THIS NOTICE* AND CONTINUE UNTIL YOU COMPLETE THE REPAIR. THE FINAL DATE FOR COMPLETION OF THE REPAIR SHALL BE *NOT LATER THAN 90 DAYS FROM SERVICE OF THIS NOTICE UPON THE OWNER OF THE PROPERTY,* OR BY *SEPTEMBER 10, 1997,* WHICHEVER IS *LATER*. SUCH REPAIRS SHALL CONFORM TO THE PROVISIONS OF THE ORANGE COUNTY BUILDING CODE.

INSTRUCTIONS AS TO VACATING THE BUILDING (IF ANY), ARE ATTACHED.

IF YOU PREFER TO *DEMOLISH* THE UNSAFE STRUCTURE, YOU MUST VACATE THE PREMISES OR SEE THAT IT IS VACATED WITHIN 60 DAYS OF SERVICE OF THIS NOTICE UNLESS OTHERWISE INSTRUCTED BY THE BUILDING OFFICIAL. YOU MUST SECURE ALL PERMITS FOR AND COMPLETE THE DEMOLITION WITHIN THE TIME LIMITS STATED ABOVE FOR REPAIR.

CONDITIONS FOUND WHICH RENDER STRUCTURE UNSAFE

The following is a list of conditions which cause the structure to be unsafe and in violation of the following Code sections:

CONDITION:

1. The building located on the property is in a general dilapidated condition so severe as to be unfit and unsafe for human occupation, and constitutes a nuisance. It is unsafe and unsanitary and, generally, violates the following code provisions:

> Standard Unsafe Building Abatement Code – Section 101.6, *Maintenance.*
>
> > All buildings or structures, both existing and new, and all parts thereof, shall be maintained in a safe and sanitary condition. All devices or safeguards which are required by the Standard Building Code in a building when erected, altered or repaired, shall be maintained in good working order. The owner, or his designated agent, shall be responsible for the maintenance of buildings and structures.

STANDARD BUILDING CODE, SECTION 101.3.5

> 101.3.5 Maintenance. All buildings, structures, electrical, gas, mechanical, and plumbing systems, both existing and new, and all parts thereof, shall be

> maintained in a safe and sanitary condition. All devices or safeguards which are required by the technical codes when constructed, altered, or repaired, shall be maintained in good working order. The owner, or his designated agent shall be responsible for the maintenance of buildings, structures, electrical, gas, mechanical and plumbing systems.

The structure located on this property has not been maintained in accordance with the above-referenced requirements. It must be maintained or demolished.

Standard Building Code – Section 102.5, *Unsafe Building or Systems*:

> All buildings, structures, electrical, gas, mechanical or plumbing systems which are unsafe, unsanitary, or do not provide adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use, constitute a hazard to safety or health, are considered unsafe buildings. all such unsafe buildings or structures or service systems are hereby declared illegal and shall be abated by repair and rehabilitation or by demolition in accordance with the provisions of the Standard Unsafe Building Abatement Code.

This structure is unsafe because it has unsafe and unsanitary systems.

Standard Housing Code – Section 103.2, *Unsafe Residential Buildings:*

Sec. 103.2.1

> All residential buildings or structures, used as such which are unsafe, unsanitary, unfit for human habitation or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use, constitute a hazard to safety or health by reason of inadequate maintenance, dilapidation, obsolescence or abandonment are considered unsafe buildings. all such unsafe buildings or structures or service systems are hereby declared illegal and shall be abated by repair and rehabilitation or by demolition in accordance with 103.2.2, 103.2.3 and *103.2.4.*

Sec. 103.2.4.

> When a residential building is to be demolished it shall be done so in accordance with the provisions of the Unsafe Building Abatement Code.

This structure is unsafe because it has unsafe and unsanitary systems.

2. The building is unsafe also because it meets certain of the criteria shown under the definition for "unsafe building" given by Section 202 of the Unsafe Building Abatement Code, which states as follows:

Unsafe Building Abatement Code – Section 202, *Definitions*

* * *

Unsafe Building – Any building or structure that has *any* of the following conditions, such that the life, health, property or safety of its occupants or of the general public are endangered:

1. Any means of egress or portion thereof is not adequate size *or* is not arranged to provide a safe path of travel in case of fire or panic.

2. Any means or egress or portion thereof such as but not limited to fire doors, closing devices and fire resistive ratings, in disrepair *or* in a dilapidated or nonworking condition such as that the means of egress could be rendered unsafe in case of fire or panic.

3. The stress in any material, member or portion thereof, due to all improved loads including dead loads exceeds the stresses allowed in the Standard Building Code for new buildings.

4. The building, structure or portion thereof has been damaged by fire, flood, earthquake, wind or other cause to the extent that the structural integrity of the building or structure is less than the minimum requirement established by the Standard Building Code for new buildings.

5. Any exterior appendage or portion of the building or structure is not securely fastened, attached or anchored such that it is capable of resisting wind, seismic, or similar loads as required by the Standard Building Code for new buildings.

6. If for any reason the building, structure or portion thereof is manifestly unsafe or unsanitary for the purpose for which it is being used.

7. The building, structure or portion thereof as a result of decay, deterioration of [sic] dilapidation is likely to fully or partially collapse.

8. The building, structure or portion thereof has been constructed or maintained in violation of a specific requirement of the Standard Codes of a city, county, or state law.

9. Any building, structure or portion thereof that is in such a condition as to constitute a public nuisance.

10. Any building, structure or portion thereof that is unsafe, unsanitary *or* not provided with adequate egress, or which constitutes a fire hazard, *or* is otherwise dangerous to human life, *or*, which in relation to existing use, constitutes a hazard to safety or health by reason of inadequate maintenance, dilapidation, obsolescence *or* abandonment.

The County Building and Housing Code Inspectors have found that certain of the conditions listed above, specifically those listed under condition(s): *1, 2, 4, 5, 6, 7, 8, 9, and 10,* exist(s) on the property. The attached inspection notice(s) describe(s) those conditions.

ADDITIONAL INFORMATION IS AVAILABLE

If you wish to obtain additional information, you may visit the Building Department on the first floor of the Orange County Administration Center at 201 South Rosalind Avenue, Orlando, Florida between 7:30 a.m. and 5:30 p.m., Monday through Friday, except holidays, or you may telephone the Building Department during those hours and days at (407) 836-5810.

DATE ISSUED: July 10, 1997
BUILDING OFFICIAL: Christ T. Sanidas

STATE OF FLORIDA
COUNTY OR ORANGE

SWORN to and subscribed freely and voluntarily for the purposes therein, expressed before me by *CHRIST T. SANIDAS*, Building Official, Orange County Building Department, known to me to be the person described in and who executed the foregoing, this 11th day of July, 1997. **He is personally know [sic] to me.**

WITNESS my hand and official seal in the County and State last aforesaid this 11th day of July, 1997.

/s/ Daphney C Middleton
Notary Public (Print Name)
Daphney C Middleton
My commission expires:

[SEAL] Daphney C. Middleton
Notary Public, State of Florida
Commission No. CC 461101
My Commission Expires 05/08/99

1-800-3-NOTARY – Fla. Notary Service & Bonding Co.

RIGHT OF APPEAL:

YOU MUST FILE AN APPEAL OF THE PROCEEDING DESCRIBED ABOVE OR THIS ORDER WILL GO INTO EFFECT WITHOUT FURTHER HEARINGS, AND ORANGE COUNTY WILL BE AUTHORIZED BY LAW TO REPAIR OR DEMOLISH YOUR BUILDING OR STRUCTURE AND CHARGE THE COST TO YOU.

Any person having a *legal interest* in the described building may appeal this Notice to the Orange County Building Board of Adjustments and Appeals. The appeal shall be filed in writing with the Orange County Building Official at the address given above under "Additional Information" within thirty (30) days of service of this notice. An application may be obtained from the Building Department. The appeal shall contain the following:

1. Identify the street address or legal description of the building.
2. Identify the legal interest of the Appellant in the building.
3. Identify the section of the Notice and Order being appealed.
4. Include a statement detailing the issues on which the Appellant desires to be heard.
5. Include the signature of the Appellant and the Appellant's official mailing address.

FAILURE TO FILE AN APPEAL WITHIN THE TIME PERIOD SPECIFIED ABOVE SHALL CONSTITUTE A WAIVER OF ALL RIGHTS TO AN ADMINISTRATIVE HEARING.

INSPECTION NOTICE
ORANGE COUNTY BUILDING DEPARTMENT
BUILDING INSPECTION DIVISION
201 South Rosalind Avenue
Orlando, Florida 32802
(407) 836-5550

Job Location: 402 Keene Rd

Building Permit No. _____

Other Permit No. _____ Date: 5-30-97

[✓] Building [ ] Electrical [ ] Mechanical
[ ] Plumbing

[ ] Rejection – Fee Due

[ ] Work Done W/O Proper Permit – Violation Fee Due

[ ] Stop Work

[ ] Other Unsafe Abatement

If there is a fee due. Fees Must Be Paid at the Building Department.

Code Sec.

103.1 Cars and other junk throughout property. All buildings on property are in an unsafe condition. Some buildings possibly on property line S.F.R. in unsafe condition and considered to be uninhabitable. Please contact the Orange County Building Dept within 72 hrs to find a way of resolving this matter or further action will be taken.

Correction of the above violations must be made and approved before proceeding with any further work.

Please call the Orange County Building Department at (407) 836-5576 for reinspections.

Time _____ Inspector F. Grimsby Identification Number 15

If there are any questions regarding this notice, the inspector will be in the office between 7:00 a.m. and 7:30 a.m.

Inspector's Phone Number (407) 836-5802

Notice given to _____ Notice left at site ✓

WHITE COPY – Posted YELLOW COPY – Office PINK COPY – Inspector

23-41 (12/91) Page 1 of _

MARTHA O. HAYNIE
ORANGE COUNTY COMPTROLLER
Sta #: 66 Oper: CS Transct #: 580197
Date: 092397 Time: 11:34:15am
OR: 5332 0309 Instr #: 1997-0345719
NOTICE DEFER NOTICE OF PAYMENT
5 Recording Fees $ 9.00
7 Add. Rec. Fees 1.50
27 Copy 1.00
B96900753-768 Sub Total $ 11.50

MARTHA O. HAYNIE
ORANGE COUNTY COMPTROLLER
Sta #: 66 Oper: CS Transct #: 580198
Date: 092397 Time: 11:34:15am
OR: 5332 0311 Instr #: 1997-0345720
NOTICE ABATEMENT NOTICE
5 Recording Fees $ 29.00
7 Add. Rec. Fees 4.00
27 Copy 3.50
1321 19th STREET
Sub Total $ 36.50

MARTHA O. HAYNIE
ORANGE COUNTY COMPTROLLER
Sta #: 66 Oper: CS Transct #: 580199
Date: 092397 Time: 11:34:15am
OR: 5332 0318 Instr #: 1997-0345721
NOTICE ABATEMENT NOTICE
5 Recording Fees $ 33.00
7 Add. Rec. Fees 4.50
27 Copy 4.00
402 W. KEENE ROAD
Sub Total $ 41.50

MARTHA O. HAYNIE
ORANGE COUNTY COMPTROLLER
Sta #: 66 Oper: CS Transct #: 580200
Date: 092397 Time: 11:34:15am
OR: 5332 0326 Instr #: 1997-0345722
NOTICE ABATEMENT NOTICE
5 Recording Fees $ 25.00
7 Add. Rec. Fees 3.50
27 Copy 3.00
138 N. NORMANDALE
Sub Total $ 31.50

MARTHA O. HAYNIE
ORANGE COUNTY COMPTROLLER
Sta #: 66 Oper: CS Transct #: 580201
Date: 092397 Time: 11:34:15am
OR: 5332 0332 Instr #: 1997-0345723
NOTICE ABATEMENT NOTICE
5 Recording Fees $ 29.00
7 Add. Rec. Fees 4.00
27 Copy 3.50
1918 S. RIO GRANDE AVE
Sub Total $ 36.50

* 580197-580201 TOTAL $ 157.50

AR Tendered: $ 157.50
Change: $ .00
COUNTY BUILDING DEPT.

C.M. Bldg. 402 W. Keene Rd
P 129 507 435

US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided.
Do not use for International Mail *(See reverse)*

Sent to: John J. Lewis	
Street & Number: 402 W. Keene Rd	
Post Office, State, & ZIP Code: Orlando, FL 32703	
Postage	$ .55
Certified Fee	1.35
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	$ 3.00
Postmark or Date	JUL 14 1997

PS Form 3800, April 1995

ABATEMENT NOTICE

App. 21

Is your RETURN ADDRESS completed on the reverse side?

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "*Return Receipt Requested*" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
John J. Lewis
402 W. Keene Rd
Orlando, FL 32703

4a. Article Number
P 129 507 435

4b. Service Type
☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

5. Received By: *(Print Name)*

8. Addressee's Address *(Only if requested and fee is paid)*

6. Signature: *(Addressee or Agent)*
X

PS Form **3811**, December 1994 Domestic Return Receipt

Thank you for using Return Receipt Service.

EXHIBIT B

BUILDING CODES BOARD OF ADJUSTMENTS AND APPEALS ORANGE COUNTY, FLORIDA

JOHN J. LEWIS,

Appellant,

CASE NO. 97-08-03

vs.

CHRIST SANIDAS, as the BUILDING OFFICIAL of ORANGE COUNTY,

Appellee.

_____/

FINAL ORDER

THIS MATTER came to be heard before the Building Codes Board of Adjustments and Appeals ("BCBAA") on August 27, 1997, for consideration of the Appeal filed by JOHN J. LEWIS, the Appellant, from the Notice of Unsafe Building issued by CHRIST SANIDAS, as the BUILDING OFFICIAL of ORANGE COUNTY, the Appellee, on July 10, 1997, regarding a single family residence, pole barn, adddition [sic] and wood building located at 402 W. Keene Road, Apopka, Florida, 32703.

The Appellant made a presentation at the hearing.

The Appellee also made a presentation.

Upon consideration, it is ORDERED that the Notice of Unsafe Building is AFFIRMED.

DONE and ORDERED by the Building Codes Board of Adjustments and Appeals effective the 27th day of August, 1997.

/s/ Joel Hammock
Joel Hammock, Chairman
Building Codes Board of
Adjustments and Appeals

Original to: Elizabeth Hayden, Recording Secretary, BCBAA

Copies to: John J. Lewis, Appellant, 402 W. Keen Road, Apopka, Florida 32703
Christ Sanidas, Building Official, Building Department, Appellee
John Warbington, Director Building Department
Daniel Mantzaris, Esquire, Counsel to BCBAA
Joel Prinsell, Assistant County Attorney

EXHIBIT C

Orange [Logo] County

Building Department
Christ T. Sanidas, Building Official
201 South Rosalind Avenue, 1st Floor
Reply To: Post Office box 2687
Orlando, Florida 32802-2687
Telephone (407) 836-5550
FAX (407) 836-5510

Certified Mail
Z 232 190 413

January 21, 1998
John J. Lewis
402 W. Keene Road
Apopka, FL 32703 [B

RE: 402 W. Keene Road

Dear Mr. Lewis:

As you were notified, your property at 402 W. Keen Road, Apopka, Orange County, Florida, has been found to be unsafe and unsanitary by the Orange County Building Department. Per the Unsafe Building Abatement Notice, served July 17, 1997 you were given 30 days to appeal and a total of 90 days to bring the structures into compliance.

As the property has not been cleared of all the code violations and is in an unsafe and unsanitary condition, the Orange County Building Department will proceed to have the structures demolished.

Should you need further information concerning this matter, please feel free to call me at (407) 836-5810.

/s/ Christ T. Sanidas

Sincerely,

Christ T. Sanidas,
Building Official

/s/John J. Lewis
1-23-98

EXHIBIT D

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA

CASE NUMBER; CI 98-6327
DIVISION: 39

JOHN J. LEWIS,

Plaintiff(s),

vs.

ORANGE COUNTY, FLORIDA, a
political subdivision of the State
of Florida.

Defendant(s).
_____/

ORDER DENYING MOTION FOR INJUNCTION

This cause came on for hearing on Plaintiff's Petition for Injunction on August 5, 1998 and the Court considered the matter and heard argument of Counsel for Plaintiff and Defendant and DENIED said Petition for injunction. The Court ordered that a two week moratorium be agreed to between the parties so Plaintiff could appeal the ruling of the Court. Both parties were advised that the moratorium would end at noon on August 19, 1998.

On August 18th an Amended Petition for Injunction was heard and testimony was taken and argument made and said moratorium was extended until noon August 21, 1998 to again allow the Plaintiff to appeal this court's action. See attached and incorporated Court record. This

Court again DENIED any injunctive relief and Court adjourned, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff's PETITION FOR INJUNCTION is hereby **DENIED**.

DONE AND ORDERED this August 20, 1998.

Original signed by:
Jeffords D. Miller
Circuit Judge
this
AUG 20 1998
and conformed copies
were furnished by
Judicial Assistant

JEFFORDS D. MILLER,
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

August 20, 1998: COURT'S JUDICIAL ASSISTANT MAILED A COPY HEREOF TO:

JOHNIE A. McLEOD, ESQ.
48 EAST MAIN STREET
APOPKA, FL 32704-0950

GEORGE L. DORSETT, ESQ.
Assistant County Attorney
201 SOUTH ROSALIND AVENUE
ORLANDO, FL 32801

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CI98-6327

JOHN J. LEWIS,

Petitioner,

v.

ORANGE COUNTY,
FLORIDA, a political
subdivision of the State of
Florida,

Respondent.
_____/

Orlando, Florida

Tuesday, August 18, 1998

2:45 p.m.

APPEARANCES:

JOHNIE A. MCLEOD, ESQUIRE
McLeod, McLeod & McLeod, P.A.
48 East Main Street
Apopka, Florida 32704-0950

Appearing on behalf of the Petitioner

GEORGE L. DORSETT, ESQUIRE
201 South Rosalind Avenue
Orlando, Florida 32801

Appearing on behalf of the Respondent

EXCERPT OF:

PROCEEDINGS

[2] Excerpt of Proceedings had before the HONORABLE JEFFORDS D. MILLER, at the Orange County

Courthouse, 425 N. Orange Avenue, Room 18-A, Orlando, Florida, on TUESDAY, AUGUST 18, 1998, beginning at 2:45 p.m., reported by STACEY SHERWOOD, being a Stenotype Shorthand Reporter and Notary Public, State of Florida a Large.

THE COURT: We had a hearing on the morning of August 5 and the Court made findings that, at that time, that the Plaintiff did not exhaust his administrative remedies with the county and I denied the Petition for Temporary Injunction. I found that there was adequate remedies at law for damages. And I did place a two-week moratorium on any action by Orange County. It was agreed to in regard to cutting off the power or taking any affirmative action in regard to demolition.

I simply wanted the Plaintiff to have the opportunity to take this matter to the Fifth district Court of Appeals to see if I had made an error in judgment in failing to grant the injunction. That period of time expires at high noon tomorrow on august the 19th. I'm going to extend that to high noon on Friday the 21st. And I'm going to find that nothing material has varied in this.

I find that the Plaintiff has not complied with [3] the laws, codes, and regulations of Orange County, that the place is hazardous for human occupation. And I'm going to deny any Petition for Injunction.

If you want to appeal it, take it over there and let them look at it. The county can take whatever action they feel is necessary and proper. So it's until 12:00 noon on Friday, August 21st. We'll be in recess.

MR. McLEOD: Did you take into consideration, Judge, no one went into the house to see if it was unsafe?

THE COURT: Mr. McLeod, look at the exhibits and make a determination in your own mind whether you feel like it's safe or not.

MR. MCLEOD: They said the house was unsafe and they never went into it.

THE COURT: Well, thank you.

(Whereupon, the proceedings were concluded at 3:36 p.m.)

[4] CERTIFICATE

STATE OF FLORIDA)

COUNTY OF ORANGE)

I, STACEY SHERWOOD Shorthand Reporter and Notary Public, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 19th day of August 1998.

/s/ Stacey Sherwood
Stacey Sherwood

[LOGO] Stacey Sherwood
Commission #CC765886
Expires MAY 19, 2000
BONDED THRU
ATLANTIC BONDING CO. INC

EXHIBIT E

[LOGO]
BUILDING DEPARTMENT
CHRIST T. SANIDAS, *Building Official*
201 South Rosalind Avenue, 1st Floor •
Reply To: Post Office Box 2687 •
Orlando, Florida 32802-2687
(407) 836-5560 • Fax (407) 836-5510
http://www.onetgov.net/onetgov/dept/pbz/building/index.htm

VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

November 30, 1998

John J. Lewis
402 West Keene Road
Apopka, FL 32703

Re: Notice of Intent to
Record Claim Against
Parcel #28-21-28-5392-00-020

This is to inform you as the owner of record of the above referenced property that in accordance with the Standard Unsafe Building Abatement Code, a structure located at 402 West Keene Road in Orange County was demolished and the debris removed on your behalf at the County's expense.

The cost to the County of demolishing the structure and removing the debris was $4,277.97.

If this amount is not paid to the County within 30 days, or arrangements satisfactory to the County have not been made to pay this amount within 30 days, then a "Claim Of Special Assessment Lien" in substantially the form enclosed will be approved by the Board of County Commissioners and recorded against your property. If

payment has not been rendered within the 30 days then statutory interest will be assessed per Section 55.03 of the Florida Statutes.

Please contact Gregory Price of this department at (407) 836-5810 if you have any questions about satisfying the debt.

Sincerely,

/s/ Christ T. Sanidas
Christ T. Sanidas
Building Official

CTS/cm
Copy: Gregory Price, Building Department

Prepared by:
Carmen Mudalier
Orange County Building Department
201 S. Rosalind Avenue
Orlando, FL 32801

Returned to:
Carmen Mudalier
Orange County Building Department
Via Interoffice Mail

CLAIM OF SPECIAL ASSESSMENT LIEN PURSUANT TO SECTION 9-812 OF THE ORANGE COUNTY CODE.

RESOLUTION NO._____

WHEREAS, on or about September 28, 1993, the Board of County commissioners adopted the **Standard Unsafe Building Abatement Code**, 1985 edition (SUBAC) at Section 22 of Ordinance No. 93-25;

WHEREAS, the SUBAC, as adopted, is codified at Section 9-811 of all Orange County Code;

WHEREAS, on or about August 27, 1996, the Board of County Commissioners adopted Ordinance No. 96-23, subsequently codified at Section 9-812 of the Orange County Code, establishing procedures to recover costs borne by Orange County in repairing or demolishing buildings or structures pursuant to the SUBAC;

WHEREAS, this Resolution is authorized by the procedures established by Ordinance No. 96-23;

WHEREAS, pursuant to the SUBAC, Orange County repaired/demolished (circle or underline one) the following building(s) or structure(s) at the following street address:

402 West Keene Road
Orange County, Florida
;

WHEREAS, Orange County rendered such services on or about the following date(s):

September 29, 1998
;

WHEREAS, the legal description of the parcel, lot or tract at which such building(s) or structure(s) is/are or was/were located is (are) as follows:

Parcel #28-21-28-5392-00-020
See attachment "A" for
complete legal description ;

WHEREAS, the last known owner(s) of record of such parcel, lot or tract is (are) the following:

John J. Lewis
402 West Keene Road
Apopka, FL 32703 ;

WHEREAS, the cost of labor, services, and material for repairing or demolishing. the building(s) or structure(s) is as follows:

Demo/Dump cost	$4,230.70
Administrative fee	$ 47.27

;

WHEREAS, of such costs, the following amount remains unpaid: $4,277.97;

WHEREAS, on or about November 30, 1998, Orange County hand delivered a notice of assessment to such owner(s)/mailed a notice of assessment to such owner(s), by U.S. Certified mail, return receipt number Z 118 136 948 (circle or underline one)

WHEREAS, the cost of hand delivering or mailing such notice of assessment was $2.75; and

WHEREAS, the cost of recording this claim of special assessment lien is $19.50.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY:

1. Orange County, the lienor, hereby approves this claim of special assessment lien, and this claim of special assessment lien shall be promptly recorded in the Official Records of Orange County, Florida.

2. This claim of special assessment lien constitutes a special assessment lien against the aforementioned property for the above-referenced unpaid costs of repairing/demolishing (circle or underline one) the building(s) or structure(s) hand delivering or mailing the notice of assessment, and recording this claim of special assessment lien, plus any statutory interest.

3 This Resolution shall become effective on the date of its adoption.

ADOPTED THIS ___ DAY OF ___, ___.

ORANGE COUNTY, FLORIDA
BY: _____
County Chairman
DATE: _____

ATTEST: Martha O. Haynie,
County Comptroller
As Clerk of the Board of County
commissioners

By: _____
Deputy Clerk

"ATTACHMENT A"

1179024 O.R. 2843 Pg. 417

Articles of Agreement,

Made this 2nd *day of* October *in the year of our Lord, one thousand nine hundred and* seventy seven

Between RALPH C. SENTERS and PERNEDA L. SENTERS, his wife, of 709 North Shane Street, Ohio City, Ohio 45874

parties of the first part, and

JOHN J. LEWIS, of P. O. Box 400, Apopka, Florida 32703

party of the second part.

Witnesseth, *That if the said party of the second part shall first make the payments and perform the covenants hereinafter mentioned on* his *part to be made and performed, the said parties of the first part hereby covenant and agree to convey and assure to the said party of the second part* his *heirs, executors, administrators or assigns, in fee simple, clear of all encumbrances whatever, by a good and sufficient deed, the lot, piece or parcel of land situated in the County of* Orange, *State of* Florida *known and described as follows, to-wit:*

Lot, McQUEEN SELECT HOMESITES, a subdivision in Orange County, Florida, as recorded in Plat Book Q, Page 105, of the Public Records of Orange County, Florida, LESS the South 210' x 207.5', and LESS the West 7.5 feet thereof.

STATE of FLORIDA
DOCUMENTARY STAMP TAX
DEPT. OF REVENUE
[SEAL]
12.60

and the said party of the second part hereby covenants and agrees to pay to the said parties of the first part the sum of Eight Thousand Four Hundred & No/100 *Dollars. In the manner following:* Commencing on November 1, 1977, monthly payments to be paid by party of the second part to parties of the first part in the amount of $100.00 per month, continuing monthly thereafter on the same day *with interest at the rate of 6 per centum per annum, payable annually on the whole sum remaining from time to time unpaid: and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land subsequent to the year* 1977, *and to keep the buildings upon said premises insured in some company satisfactory to the part of the first part, and payable for the parties, respectively as their interests may appear, in a sum not less than*

DOLLARS

during the term of this agreement. That in case of failure of the said party of the second part to make any of the payments or any part thereof, or to perform any of the covenants on his *part hereby made and entered into, this contract shall, at the option of the parties of the first part, be forfeited and terminated, and the party of the second part shall forfeit all payments made by* him *on this contract; and such payments shall be retained by the said parties of the first part in full satisfaction and liquidation of all damages by* them *sustained, and the said parties of the first part shall have the right to re-enter and take possession of the premises aforesaid without being liable to any action therefore.*

It is Mutually Agreed, *by and between the parties hereto, that the time of each payment shall be an essential part of this*

contract, and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In Witness Whereof, *The parties to these presents have hereunto set their hands and seals the day and year first above written.*

Signed sealed and Delivered in Presence of:

[Illegible]
[Illegible]
[Illegible]
[Illegible]

/s/ Ralph C. Senters
RALPH C. SENTERS
/s/ Perneda L. Senters
PERNEDA L. SENTERS
/s/ John J. Lewis
JOHN J. LEWIS

[Illegible]
[Illegible]
[Illegible]

EXHIBIT F

McLeod, McLeod & McLeod, P.A.
Attorneys and Counselors at Law
Post Office Drawer 950
Apopka, Florida 32704-09550

Johnie A. McLeod
Raymond A. McLeod
William J. McLeod

48 East Main Street
Telephone: (407) 886-3300
Facsimile: (407) 886-0087

December 28, 1998

Christ T. Sanidas
Gregory Price
Orange County Building Dept.
P.O. Box 2687
Orlando, FL 32802-2687

Re: John J. Lewis

Dear Sir:

This is to inform you that Mr. Lewis is not the last known owner of record of the real property located at 402 W. Keene Road, Apopka, Florida 32703.

I remain,

Sincerely yours,

/s/ Johnie A. McLeod
Johnie A. McLeod

EXHIBIT G

Hans HOECK, Plaintiff-Appellant,

v.

CITY OF PORTLAND, a municipal corporation, Defendant-Appellee.

No. 93-35691.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 1, 1994.

Decided June 12, 1995.
As Amended July 10, 1995.

Thomas P.E. Herrmann, Gleaves, Swearingen, Larsen, Potter, Scott & Smith, Eugene, OR, for plaintiff-appellant.

James Esterkin and Marc Zwerling, Winfree, Fearey & Zwerling, Portland, OR, for plaintiff-appellant (on the briefs).

Tracy Pool Reeve, Deputy City Atty., Portland, OR, for defendant-appellee.

Appeal from the United States District Court for the District of Oregon.

Before: FLETCHER, NELSON, and RYMER, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiff Hans Hoeck appeals from a summary judgment for the defendant City of Portland (the "City"). Hoeck argues on appeal that the district court erred because the demolition of his building constitutes a violation of substantive due process and is a taking under

Oregon law. Hoeck also argues that he is entitled to a declaration under 28 U.S.C. § 2201 that he is not liable for demolition costs. We have jurisdiction, 28 U.S.C. § 1291, and affirm.

FACTS

Hoeck was the owner of the Bridgeport Hotel, a vacant six-story building located in Portland, Oregon. During 1984 and 1985, Hoeck made plans to renovate the Bridgeport and to add four additional stories, converting it into a ten-story office building. After obtaining a financial commitment from a lender and a building permit from the City, Hoeck commenced the renovation project. However, shortly after the project began, the City suspended construction pending a further review of his plan. About six months later, Hoeck was permitted to recommence work. Shortly thereafter, on March 6, 1986, Hoeck's financing was discontinued due to the insolvency of his lender, and he was never able to obtain replacement financing. Hoeck expended substantial sums – approximately $1 million – in connection with the project.

More than three years later, on May 15, 1989, the City took its first action against the Bridgeport. On that date, pursuant to the Portland City Code ("PCC"), the Bureau of Buildings filed a complaint with the Code Hearings Officer ("CHO") pursuant to authorization under PCC §§ 24.55.250 and 24.55.300: It alleged that the Bridgeport was an "abandoned" structure in violation of PCC § 24.15.020. Under the PCC, an abandoned structure is defined as "a structure that has been vacant for a period

in excess of six months, or any period less than six months when a vacant structure or portion thereof constitutes an attractive nuisance or hazard to the public." PCC § 24.15.020. The complaint also alleged that the Bridgeport was a dangerous structure under PCC § 24.15.060.

Administrative hearings were held before the CHO on five occasions. During the course of these hearings, the City submitted evidence that the Bridgeport was attracting transients and drug users, contained substantial amounts of debris, and had numerous structural flaws due to its incomplete state. By the time the last hearing was held on October 4, 1991, the Bridgeport was no longer classified as a "dangerous" building. It had been secured with steel shutters, was structurally sound, and not in danger of collapse. Nevertheless, the CHO ordered the Bridgeport demolished on the grounds that it was an "abandoned" structure under PCC § 24.15.020.[1] The CHO's supplemental order, issued on October 4, 1991, further stated:

> The structure . . . in its current partially complete and gutted condition, remains a visual blight upon the surrounding neighborhood.
>
> There is nothing in the record of this proceeding that would lead me to believe that further delay in the demolition of this structure would do anything other than inflict this ugly and potentially hazardous

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[1] The Portland City Code provides that abandoned or dangerous structures may be abated pursuant to PCC §§ 24.55.250 and 24.55.300, the latter of which empowers the CHO to order demolition.

building on the neighborhood and the city for some additional, indefinite time.

On two occasions, Hoeck sought review of the demolition order in Multnomah County Circuit Court. Both times the orders were held to be enforceable. On July 27, 1992, the City began demolition and completely removed the structure from the property.

Hoeck filed his action in federal court on January 26, 1993. His complaint set forth three causes of action: 1) an action under 28 U.S.C. § 1983 claiming a violation of substantive due process; 2) a claim for declaratory relief under 28 U.S.C. § 2201 that because the demolition was in violation of his constitutional rights, the City could not assess its demolition costs against him; and 3) a state law inverse condemnation claim based on the district court's pendent jurisdiction, 28 U.S.C. § 1367. Each party submitted a summary judgment motion on all the claims. The district court denied Hoeck's motion, granted the City's, and dismissed Hoeck's complaint. This timely appeal followed.

STANDARDS OF REVIEW

We review de novo whether the district court had jurisdiction. *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 474 (9th Cir.1994); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 163 (9th Cir.1993).

We review de novo the district court's grant of summary judgment, viewing the evidence in the light most favorable to the nonmoving party to determine whether any genuine issues of material fact exists and whether the

district court correctly applied the relevant substantive law. *Christensen,* 995 F.2d at 163.

"[W]e may affirm 'on any basis fairly supported by the record.' " *Janicki Logging Co. v. Mateer,* 42 F.3d 561, 564 (9th Cir.1994) (quoting *City of Las Vegas v. Clark County,* 755 F.2d 697, 701 (9th Cir.1985)).

JURISDICTION

Although the City challenged jurisdiction in the district court, neither party does so on appeal. We must nevertheless determine *sua sponte* whether we have jurisdiction. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction"); *Harris v. Provident Life & Accident Ins. Co.,* 26 F.3d 930, 932 (9th Cir.1994). We review the existence of subject matter jurisdiction in the district court de novo. *Allah v. Superior Court of California,* 871 F.2d 887, 890 (9th Cir.1989).

The district court determined that it had federal question jurisdiction over the claim for declaratory relief and the substantive due process claim, 28 U.S.C. § 1331, and pendent jurisdiction over the state takings claim, 28 U.S.C. § 1367. We examine the jurisdiction as to each of these claims. We conclude that we have jurisdiction over the substantive due process claim and the state takings claim. The jurisdiction over the claim for declaratory relief is unclear and its resolution convoluted. Since we find the claim meritless in any event, we do not decide whether we have jurisdiction over it.

OVER SUBSTANTIVE DUE PROCESS CLAIM

The plaintiff contends that the district court properly based its jurisdiction on his claim that the City violated his right to substantive due process under the Fourteenth Amendment. We agree.

The Supreme Court has set forth the general rule that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' " *Albright v. Oliver*, 510 U.S. 266, ___, 114 S.Ct. 807, 813, 127 L.Ed.2d 114 (1994) (plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989)). At first blush, the substantive due process claim would appear to be precluded by a more specific claim based on the Takings Clause. However, in *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1408-09 n. 10 (9th Cir.1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), we held that *Graham* does not bar a companion substantive due process claim alleging that "the government has used its power in an abusive, irrational or malicious way." *Id.* at 1408-09 n. 10; *see also Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir.1988) (finding that substantive due process claim is not subject to exhaustion requirement of taking claim). Thus, we must determine whether Hoeck's section 1983 claim falls within the *Sinaloa* exception to *Graham*.

It is only with some difficulty that we are able to discover a substantive due process claim in Hoeck's pleadings. The words "substantive due process" do not

appear in Hoeck's Complaint.[2] It was only after the City argued that the district court lacked subject matter jurisdiction that Hoeck first breathed the words "substantive due process" and characterized his claim as challenging the City's authority to "demolish the Bridgeport Hotel solely because of its unoccupied status irrespective of the City's motives, the City's procedures or whether the City pays compensation." Plaintiff's Response to Defendant's June 15, 1993 Memorandum, at 3. On appeal, Hoeck did not argue in terms of substantive due process until his reply brief, apparently triggered by the City's mention that it had challenged jurisdiction below. In the brief, he asserted that his "substantive due process claim is based on the government's failure to treat a citizen with some minimal standard of rationality and fairness."

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[2] In Count 1 of his complaint, Hoeck alleges as follows:

> The City's demolition of the Bridgeport Hotel under color of its Ordinance was undertaken with the intention to deprive, and has deprived, Hoeck of his rights, privileges and immunities secured by the Constitution of the United States, and of his property without due process of law.
>
> As it was applied to Hoeck, the Ordinance is in violation of Hoeck's rights under the Fifth and Fourteenth Amendments of the United States Constitution and therefore unenforceable for at least the following reasons:
>
> * * * *
>
> • the initial notice of hearing failed to inform Hoeck that the City sought to demolish the Bridgeport Hotel solely because it was unoccupied, and
>
> • Schatzer [the CHO] lacked authority under the Ordinance to order the demolition of the Bridgeport Hotel solely because it was unoccupied.

Complaint ¶¶ 29-30.

While the claim is certainly not artfully asserted in the complaint, we read it charitably, and since the City did not appeal the district court's finding of jurisdiction, we do not fault Hoeck's delay in addressing it directly until his reply. We somewhat reluctantly conclude that Hoeck advances a claim of substantive due process sufficient to fall within the *Sinaloa* exception. Therefore, we conclude that we have subject matter jurisdiction over this claim.

OVER PENDENT STATE TAKINGS CLAIM

We next consider whether the district court properly exercised pendent jurisdiction over the state inverse condemnation claim. We conclude that it did.

District courts have discretion to hear pendent state claims where there is a substantial federal claim arising out of a common nucleus of operative fact. 28 U.S.C. § 1367(a); *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). This is a "doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988). The court must weigh "considerations of judicial economy, convenience and fairness to the litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims." *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139. However, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of

applicable law." *Id.* If "state issues substantially predominate, . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals." *Id.*, 383 at 726-27, 86 S.Ct. at 1139.

During the course of summary judgment proceedings, the City moved to dismiss the inverse condemnation claim. The parties briefed the issue of whether pendent jurisdiction should be exercised over this claim. The district court found that it had jurisdiction over the federal substantive due process claim and denied the City's motion to dismiss the pendent state claim.

We defer to the discretion of the district court, recognizing that "the district court is in the best position to judge the extent of resources invested in a case." *Schneider v. TRW, Inc.*, 938 F.2d 986, 993-94 (9th Cir.1991).

OVER REQUEST FOR DECLARATORY RELIEF

Hoeck's other claim is brought under the Declaratory Judgment Act, 28 U.S.C. § 2201, and seeks a declaration that he is not liable for the demolition costs because the demolition was in violation of his substantive due process rights. He asserts that jurisdiction is proper here based on 28 U.S.C. § 1331. The nature of declaratory relief often makes the inquiry into the propriety of jurisdiction difficult. Accordingly, because we find the merits of this claim insubstantial, *see* Part II of the Discussion, we decline to resolve the jurisdictional question in this case. *Lee v. City of Beaumont*, 12 F.3d 933, 937 (9th Cir.1993); *Clow v. U.S. Dep't of Housing and Urban Dev.*, 948 F.2d 614,

616 n. 2 (9th Cir.1991) ("[W]here an appeal presents difficult jurisdictional questions, we may forego the resolution of these issues if the merits of the appeal are insubstantial.").

DISCUSSION

I. SUBSTANTIVE DUE PROCESS CLAIM

Hoeck claims first that the demolition of his building without paying compensation violated his substantive due process rights. We disagree.

Viewing the record in the light most favorable to the plaintiff, we must determine whether a reasonable jury could find that the City's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926); *see also Halverson v. Skagit County*, 42 F.3d 1257, 1261-63, *amended*, (9th Cir.1994). Substantive due process provides considerable protection for fundamental rights. *Albright v. Oliver*, 510 U.S. 266, ___, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994). Here, however, because the plaintiff's claim is not based on a fundamental right, "we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *Halverson*, 42 F.3d at 1262 (quoting *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir.1994)) (emphasis in original); *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir.), *cert. denied*, 513 U.S. 870, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994).

We agree with the district court that the City's demolition of the plaintiff's vacant building had a rational basis. The City had ample authority under the Portland City Code to abate abandoned buildings. *See* PCC § 24.44.250(h)(1) ("Abandoned structures as defined in this Chapter shall be abated pursuant to the provisions of Sections 24.55.250 or 24.55.300."). We also agree with the district court that the City could rationally conclude that there is "a greater danger to the public from unoccupied substandard buildings than from occupied ones." *Shaffer v. City of Winston*, 33 Or.App. 391, 576 P.2d 823, 824 (1978). Indeed, even the plaintiff acknowledges that the defendant had the authority, under its police power, to raze the Bridgeport. Finally, because Oregon state law provides a procedure for pursuing compensation through an inverse condemnation, there is nothing clearly arbitrary and unreasonable about the City's failure *sua sponte* to pay compensation. *Halverson*, 42 F.3d at 1262-63.

We conclude that as matter of law, no reasonable jury could find that the City has acted in an clearly arbitrary and unreasonable manner. Accordingly, we affirm the district court's grant of summary judgment for the defendant on the plaintiff's substantive due process claim.

II. REQUEST FOR DECLARATORY RELIEF

Hoeck's claim for declaratory relief rests on his contention that he is not liable for demolition costs because the uncompensated demolition violated his substantive due process rights. We have determined that the City did

not violate Hoeck's substantive due process rights. Consequently, we find that Hoeck's claim for declaratory relief is likewise without merit.

III. STATE LAW TAKING CLAIM

Hoeck's final claim is that the district court erred by ruling that the City's action did not constitute a taking under Oregon law. Hoeck contends that the demolition of the Bridgeport Hotel entitles him to compensation in the equivalent of an inverse condemnation action. Hoeck argues that compensation is due because the demolition constituted a physical invasion of his property, denied him all economically viable use of his property, and failed to advance a legitimate state interest sufficient to outweigh the burden placed on his property interests. We find that these claims lack merit and affirm the district court.

Article I, section 18 of the Oregon Constitution provides that "[p]rivate property shall not be taken for public use . . . without compensation." "The basic thrust of this constitutional provision is generally the same as the 'takings' provision of the Fifth Amendment to the federal constitution." *Ferguson v. City of Mill City,* 120 Or.App. 210, 852 P.2d 205, 213 (1993) (citing *Suess Builders v. City of Beaverton,* 294 Or. 254, 656 P.2d 306, 310 n. 5 (1982); *Cereghino v. State Highway Commission,* 230 Or. 439, 370 P.2d 694 (1962)). Oregon law is identical to Fifth Amendment "physical" takings law. *Id.* Thus, while Oregon law ultimately controls, we rely to some extent on federal takings law to resolve Hoeck's state inverse condemnation claim.

A. Physical Taking

Hoeck argues first that the demolition of his building is a physical taking that entitles him to compensation. We disagree.

An otherwise valid exercise of the police power constitutes a taking for which compensation is due if the owner suffers a permanent, physical occupation of the property. *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, ___, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28, 102 S.Ct. 3164, 3171-72, 73 L.Ed.2d 868 (1982); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 20 L.Ed. 557 (1871); *Ferguson*, 852 P.2d at 207. Physical invasions have been found where the government interferes with the owner's "right to exclude." *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (public access to pond); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (public easement to beach); *Loretto*, 458 U.S. at 427-28, 102 S.Ct. at 3171-72 (installation of cable); *Pumpelly*, 80 U.S. at 166 (flooding); *Hawkins v. City of La Grande*, 315 Or. 57, 843 P.2d 400 (1992) (one-time flooding). However, the state may enter property to enforce a valid land-use regulation and destroy the offending property. This does not amount to a physical occupation even where the government's activity has a permanent effect. *See Miller v. Schoene*, 276 U.S. 272, 278, 48 S.Ct. 246, 247, 72 L.Ed. 568 (1928) (permitting state entomologist to enter property and destroy diseased trees without affecting a taking); *see also Bowditch v. Boston*, 101 U.S. 16, 18-19, 25 L.Ed. 980

(1880) (denying compensation to owners whose houses were destroyed to prevent spread of fire); *Shaffer*, 576 P.2d at 824-25 (finding that city may enter to demolish substandard vacant building without compensating owner).

The demolition of the Bridgeport Hotel was not a physical taking for public use. To the contrary, it was a restriction on the use of the property to maintain an abandoned structure. The Portland Regulations did not interfere with Hoeck's right to exclude. Indeed, if Hoeck had obeyed the City's order to repair the structure and put it to use, it would not have been necessary for the City to enter his property to enforce its regulations. *Cf. Yee*, 503 U.S. at 526-28, 112 S.Ct. at 1528 ("[T]he government affects a physical taking only when it requires the land owner to submit to the physical occupation of his land.") (emphasis added); *Ferguson*, 852 P.2d at 207 (same). Because the City's presence was temporary, and its entry avoidable, Hoeck has suffered no permanent physical invasion of his ownership interest in his property. Accordingly, we find his claim of a physical taking to be without merit.

B. Regulatory Taking

Hoeck argues next that the demolition was a regulatory taking because the City's action denied him all economically viable use of his property and failed to advance a legitimate state interest sufficient to outweigh the burden placed on his property interests. We disagree.

Under Oregon law, "[a] property owner has a high threshold to surmount in order to obtain compensation

from the government for losses occasioned by a regulation of property that serves a legitimate governmental objective." *Benson v. City of Portland,* 119 Or.App. 406, 850 P.2d 416, 420 (1993), *rev. denied,* 318 Or. 24, 862 P.2d 1304 (1993). A city may wholly exclude a particular use of property if it has a rational basis for doing so, and "aesthetic concerns alone may warrant an exercise of the police power." *Oregon City v. Hartke,* 240 Or. 35, 400 P.2d 255, 262 (1965). Furthermore, to state a cause of action for inverse condemnation, Hoeck must show that his property was taken for a public use. *Willard v. City of Eugene,* 25 Or.App. 491, 550 P.2d 457, 458 (1976); *cf.* Jeb Rubenfeld, *Usings,* 102 Yale L.J. 1077 (1992) (arguing for "usings" requirement in federal takings law).

In the past, demolition cases have not been found to constitute a taking under Oregon law. In *Willard v. City of Eugene,* an Oregon Court of Appeals held that a demolition is not a taking for public use because the city does not acquire any right or thing for public use by its action. 550 P.2d at 459. In *Shaffer v. City of Winston,* the court held that the demolition of a vacant or abandoned substandard building is within a municipality's police power and does not constitute a compensable taking. 576 P.2d at 825. "The general rule is that a municipality in the exercise of its police power may, without compensating the owner, destroy a building that threatens the public safety where, after reasonable notice and opportunity, the owner fails to remedy the dangerous condition." *Id.*

More recently, in *Dodd v. Hood River County,* 317 Or. 172, 855 P.2d 608 (1993), the Oregon Supreme Court clarified the proper analysis under Oregon law for regulatory takings. The court addressed whether a zoning regulation

prohibiting the construction of a family dwelling in a forestry zone constituted a taking in violation of the Oregon Constitution and concluded that it did not. The *Dodd* court first determined that zoning regulations that limit the uses of property do not constitute a "taking of private property for public use." *Id.* 855 P.2d at 614. The court acknowledged the possibility that the Fifth Amendment may afford greater protection against takings, *id.*, and went on to apply the following test under Oregon law:

> Where a zoning designation allows a landowner *some substantial beneficial use* of his property, the landowner is not deprived of his property nor is his property "taken." Such a loss, if any, is "damnum absque injuria."

Id. (quoting *Suess Builders*, 581 P.2d at 50 (emphasis added in original)). The *Dodd* court explicitly declined to make a landowner's "investment-backed expectations" part of a regulatory takings analysis. *Id.* However, the court concluded that such expectations, if relevant, must be reasonable to support a claim for a taking. That is, reasonable "investment-backed expectations must take into account the current state of the law [at the time the property is purchased], as well as the government's power to change the law." *Id.* at 616.

Applying these rules to the case at hand, we hold that the City's demolition of the Bridgeport is not a regulatory taking under Oregon law. As *Shaffer*, 576 P.2d at 825, and *Willard*, 550 P.2d at 458-59, demonstrate, the City acts well within the scope of its police power by

removing abandoned structures. Furthermore, the demolition did not deprive Hoeck of all economically beneficial use of his property. *See Dodd*, 855 P.2d at 616. Hoeck argues that the demolition completely destroyed his building – an indisputable claim. However, the lot remains and is suitable for appropriate development. Finally, the regulation has not interfered with Hoeck's reasonable, investment-backed expectations. *See id.* Under the law at the time Hoeck took title, he had no right to use his property to maintain an abandoned structure. *Lucas*, 505 U.S. at ___, 112 S.Ct. at 2895; PCC § 24.55.100; PCC § 24.55.250(h)(1); PCC § 24.55.300. Therefore, even if Hoeck's property interest is narrowed to include only his building, he suffered no taking of an existing property interest and no interference with his reasonable expectations.

We conclude that Hoeck's claim for a regulatory taking under Oregon law is without merit.

AFFIRMED.

EXHIBIT H

AFFIDAVIT

STATE OF FLORIDA:
COUNTY OF ORANGE:

BEFORE ME, the undersigned authority personally appeared Christ T. Sanidas, who, after being duly sworn, deposes and says:

1. My name is Christ T. Sanidas, and I am the Building Official for Orange County, Florida.

2. I am competent to make this affidavit and all statements made herein are based on my personal knowledge.

3. I have reviewed the foregoing Motion and state that all of the factual allegations contained there are true and correct.

4. Exhibit A to the motion is a true and correct copy of the Notice and Order I sent to John Lewis. This notice was sent after the Building Department conducted appropriate inspections and determined that the structures at 402 W. Keen Road in Apopka, Florida were unfit and unsafe for human habitation.

5. Exhibit B to the motion is a true and correct copy of the Final Order issued by the Building Codes Board of Adjustments and Appeals upholding my Notice and Order. I attended the hearing, as well as the later injunction hearing in Circuit Court. Mr. Lewis was represented by Mr. McLeod at the Injunction hearing.

6. Exhibit C to the motion is a true and correct copy of the demolition notice that I sent to Mr. Lewis on

January 21, 1998, notifying Mr. Lewis that because he had neither complied with the Notice and Order nor appealed the Board's final order, the structures would be demolished.

7. Exhibit D to the motion is a true and correct copy of the Circuit Court Order that I received after the injunction hearing.

8. Exhibit E to the motion is a true and correct copy of the November 30, 1998 letter that I sent to Mr. Lewis notifying him of the cost of demolition and requesting reimbursement.

9. Exhibit F to the motion is a true and correct copy of the December 28, 1998 letter that I received from Mr. McLeod, on behalf of Mr. Lewis, claiming that Mr. Lewis is not the owner of the property at 402 W. Keen Road, Apopka, Florida 32703.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Christ T. Sanidas
Christ T. Sanidas

STATE OF FLORIDA
COUNTY OF ORANGE

Sworn to and subscribed before me this 25 day of January, 1998, by Christ T. Sanidas, who is personally known to me and who did take an oath.

/s/ Maureen E. Conroy
Notary Public
My Commission Expires: 01/19/00

[LOGO] Maureen E. Conroy
Notary Public, State of Florida
Commission No. CC 524577
My Commission Expires 01/19/00

1-800-3-NOTARY – Fla. Notary Service & Bonding Co.

APPENDIX B

BUILDING CODES BOARD OF ADJUSTMENTS AND APPEALS ORANGE COUNTY, FLORIDA

JOHN J. LEWIS,

Appellant,

CASE NO. 97-08-03

vs.

CHRIST SANIDAS, as the BUILDING OFFICIAL of ORANGE COUNTY,

Appellee.

_____/

FINAL ORDER

THIS MATTER came to be heard before the Building Codes Board of Adjustments and Appeals ("BCBAA") on August 27, 1997, for consideration of the Appeal filed by JOHN J. LEWIS, the Appellant, from the Notice of Unsafe Building issued by CHRIST SANIDAS, as the BUILDING OFFICIAL of ORANGE COUNTY, the Appellee, on July 10, 1997, regarding a single family residence, pole barn, adddition [sic] and wood building located at 402 W. Keene Road, Apopka, Florida, 32703.

The Appellant made a presentation at the hearing.

The Appellee also made a presentation.

Upon consideration, it is ORDERED that the Notice of Unsafe Building is AFFIRMED.

DONE and ORDERED by the Building Codes Board of Adjustments and Appeals effective the 27th day of August, 1997.

/s/ Joel Hammock
Joel Hammock, Chairman
Building Codes Board of
Adjustments and Appeals

Original to: Elizabeth Hayden, Recording Secretary, BCBAA

Copies to: John J. Lewis, Appellant, 402 W. Keen Road, Apopka, Florida 32703
Christ Sanidas, Building Official, Building Department, Appellee
John Warbington, Director Building Department
Daniel Mantzaris, Esquire, Counsel to BCBAA
Joel Prinsell, Assistant County Attorney